Case No. 17-1108

United States Court of Appeals for the Sixth Circuit

NLRB v. Masonic Temple Assoc of Detroit, et al

ON APPLICATION FOR ENFORCEMENT OF ORDER OF NLRB

RESPONDENT MASONIC TEMPLE ASSOCIATION OF DETROIT AND 450 TEMPLE, INC.'S BRIEF IN OPPOSITION TO ENFORCEMENT OF DECISION AND ORDER OF NLRB

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STATEMENT OF CORPORATE AFFILIAIONS AND FINANCIAL INETEREST

Pursuant to 6th Cir. R. 26.1, Respondent Masonic Temple Association of Detroit and 450 Temple, Inc., a single employer, makes the following disclosure:

1. Are said parties a subsidiary or affiliate of a publicly owned corporation?

   No.

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   None.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

Date: May 1, 2017 */s/Eric I. Frankie (P47232)*

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III. STATEMENT IN SUPPORT OF ORAL ARGUMENT

Respondent Masonic Temple Association of Detroit and 450 Temple, Inc., a single employer, is not requesting oral argument in this matter.

IV. STATEMENT OF JURISDICTION

1. Petitioner N.L.R.B. has original jurisdiction over this matter because Petitioner is empowered to prevent any person from engaging in any unfair labor practice affecting commerce pursuant to 29 U.S.C. §160(a).

2. This Court has jurisdiction over Petitioner's Application for Enforcement of Order pursuant to 29 C.F.R. §160(e) and FRAP 15.

3. Petitioner filed its Application for Enforcement of Order on February 1, 2017 which was timely since there are no specific time limits for same. Respondent timely filed its Answer on February 19, 2017, which was timely pursuant to FRAP 15(b)(2).

4. Petitioner's Application is from a final decision and order of the NLRB dated November 29, 2016.

IV. STATEMENT OF ISSUES PRESENTED

I. WHETHER PETITIONER APPLIED THE CORRECT LEGAL STANDARD TO DETERMINE THAT THE UNFAIR LABOR PRACTICE CHARGE WAS TIMELY FILED.

II. WHETHER PETITIONER APPLIED THE CORRECT LEGAL STANDARD TO DETERMINE WHETHER IT WAS PROPER FOR RESPONDENT TO WITHDRAW RECOGNITION OF CHARGING PARTY AND REFUSE TO BARGAIN.

VI. STATEMENT OF THE CASE

Charging Party International Union of Operating Engineers, Local 324 ("Charging Party"), and Respondent Masonic Temple Association of Detroit and 450 Temple, Inc., a single employer, ("Respondent") were last parties to a collective bargaining agreement in December, 2009. Roger Sobran ("Sobran") is Respondent's President and has served in this capacity since January, 2008. (117)[1] As President, Sobran oversees Respondent's day-to-day operations. (117) Sobran testified that there has been no collective bargaining agreement in effect covering Charging Party 's employees since the January 1, 2008 to December 31, 2009 Agreement between Olympia Entertainment (Masonic Temple) and the International Union of Operating Engineers Local 541 expired. (119-20) Charging Party's Business Representative James Arini ("Arini") also testified that the last contract between Respondent and the Charging Party expired in December of 2009. (64)

On January 12, 2011, Respondent and Charging Party entered into a Settlement Agreement of NLRB Case No. 7-CA-53394 filed by Charging Party as a result of which the Respondent agreed to recognize and bargain with the union as the exclusive bargaining representative for some of Respondent's employees as a successor employer. (230) Sobran testified that since this Settlement Agreement

[1] All numbers in parentheses refer to the applicable pages of the Administrative Record filed with this Court on March 13, 2017.

was entered in January, 2011, Respondent has not received any written demand to bargain from Charging Party for any employees that it claimed to represent. (121) Also, Sobran stated that after this Settlement Agreement was entered in January, 2011, he did not recall having any meetings where Arini indicated that he wanted to negotiate a collective bargaining agreement for employees claimed to be in the union. (121)

After Respondent executed the Settlement Agreement with Charging Party, Arini testified that negotiations were scheduled between the parties in January, 2011. (66-8) Arini stated that the last bargaining session between the parties occurred in May, 2011. (68-9) Arini identified five bargaining sessions between January and May, 2011. (69) Arini acknowledged that no agreement reached between the parties by May, 2011. (69) Sobran testified that these discussions related to the implementation of the January, 2011, Settlement Agreement. (122-3) As a result, Sobran didn't believe that the Respondent was engaged in negotiations for a contract at these meetings. (123) Arini testified that there was an additional negotiation session in January, 2012 with the successor employer, Detroit Masonic Temple Theatre group. (71-2) Sobran recalled one meeting related to bargaining a contract during this time period. (123-4)

Arini testified that he tried unsuccessfully to contact Sobran to schedule negotiations, in person or by phone, on an approximately monthly basis after the

last bargaining session in January, 2012 through January, 2015. (72-76) Sobran was not aware that Arini tried to stop by or call him as Arini claimed. (125) Arini admitted, however, that he took no additional steps to try to get a contract other than his monthly visits and phone calls. (77-8; 92) Arini also admitted that he learned in October, 2014, that the Charging Party's last dues paying member, Mr. Buono, no longer worked for Respondent. (80-1) Sobran testified that since June, 2014, there have been no members of Charging Party working at the site. (126) No members currently employed by Respondent in Charging Party's claimed bargaining unit have indicated to Sobran that they are or wish to be union members. (127)

Arini testified that on January 13, 2015, he talked to Sobran. (83) Arini stated that he told Sobran that they needed to negotiate a collective bargaining agreement and that the Charging Party's trustees were serious about taking the non-represented members out of the health and welfare fund. (83-4) According to Arini, Sobran told him that this wouldn't be a big deal because Respondent was investigating other healthcare options. (84) Sobran also told Arini there were no more of Charging Party's members working at the site and that Michigan was a right to work state so he didn't have to negotiate with Charging Party. (84) Arini claimed he told Sobran he would be filing a charge with the Labor Board and that

Sobran then hung up. (84) Arini made no attempts to contact Sobran after this call. (85)

However, in his Board Affidavit, Arini indicated that the first thing he told Sobran was the Union would file an unfair labor practice charge unless he agreed to negotiate with Charging Party. (97) Arini also stated in his Board Affidavit that he told Sobran that the Union's healthcare fund would discontinue allowing non-bargaining unit employees to participate in the Union-offered healthcare plans unless he negotiated a contract with Charging Party. (97-8)

Sobran testified that he felt Arini, by his remarks during the January, 2015 phone call, was trying to threaten him into negotiations. (127) Sobran questioned Arini about the need for negotiations because there were no union members at the site. (127) Sobran did not see a purpose to talking with Arini because all of Charging Party's members had left employment. (128)

Arini admitted that Charging Party has had no dues paying members working for Respondent since June, 2014, when Mr. Buono retired. (81, 87) Arini stated that he learned this in October, 2014, when he was made aware at a trustees meeting that Respondent was requesting a refund of the insurance payments made on his behalf. (81) Arini testified: "well, that would have meant that he was the last dues-paying member at the Temple and that I was going to need to get another,

or get the collective bargaining agreement signed, or get a collective bargaining agreement negotiated and signed." (81)

Arini also admitted that since December, 2010, he has not sent any written demand to bargain to Sobran. (87-8) Arini had no idea of how many of Respondent's employees could possibly be in Charging Party's claimed bargaining unit. (88) Arini was last on site prior to June, 2013. (92) Since then, Arini admitted that he has no personal knowledge of Respondent's employees that might have fit within Charging Party's bargaining unit. (92-3)

Significantly, Arini believed that since the January 16, 2011 Settlement Agreement was entered, that Respondent has not responded in good faith to any request by Charging Party to bargain. (89) Arini also acknowledged that he had not received a response from Sobran since April, 2013 to his request to bargain over the employees Charging Party believed to be in its bargaining unit. (98) This was one of the reasons for Arini's call to Sobran in January, 2015. (98)

On January 15, 2015, the Charging Party filed an unfair labor practice charge with Petitioner National Labor Relations Board ("Petitioner") against the Respondent based on the allegation that since on or about July 15, 2014 Respondent had refused to bargain in good faith. (174) On September 14, 2015, Petitioner issued its Complaint and Notice of Hearing against Respondent that alleged, among other things, that: (1) since at least January 12, 2011, Respondent

has recognized the Charging Party as the exclusive collective bargaining representative of the claimed unit, (2) this recognition was embodied by a recognition agreement signed by Respondent and Charging Party on January 12 and 16, 2011, respectively, (3) at all times since January 12, 2011, Charging Party has been the exclusive collective bargaining representative of the claimed unit, (4) on or about January 13, 2015, Charging Party, by telephone, requested that Respondent bargain with it, and (5) since about January 13, 2015 Respondent has failed and refused to bargain with Charging Party in good faith. (156-8)

On September 25, 2015, Respondent filed its Answer to Complaint and Notice of Hearing denying the Petitioner's allegations. (149-50) Respondent also raised the Affirmative Defense that the underlying charges were filed outside of the six month statutory period. (150)

On November 10, 2015, the Petitioner, by Administrative Law Judge Christine Dibble ("ALJ"), conducted a hearing on the Petitioner's unfair labor practice charge against Respondent.

On June 6, 2016, the ALJ found that Respondent committed the unfair labor practice of failing and refusing to bargain with the Charging Party as the exclusive collective bargaining representative of the asserted unit's employees. (259) The ALJ determined that the Petitioner's Complaint was timely under Section 10(b) of the Act. The ALJ based this ruling on, essentially, three findings. First, the ALJ

believed that it was not unreasonable for the Union to assume after the January 2011 settlement agreement that Respondents would continue to recognize it as the exclusive representative for Respondent's bargaining unit employees (255-6). Second, the ALJ found that it was not plausible Respondent would have informed the Union prior to May 2014 that it was withdrawing recognition and refusing to bargain with the Union. (256) Third, the ALJ concluded that it was on January 13, 2015 when the Union was first made aware of Respondent's decision not to recognize and/or bargain with it. (256)

The ALJ then held that the Charging Party retained its majority status even after the expiration of the last CBA which Respondent failed to rebut. (257) The ALJ noted that Respondent's argument that there are no current employees in the claimed unit who have indicated that they are or wish to be Charging Party's members was contrary to current Board law that the employees' union membership status is not determinative of the employer's obligation to bargain. (256-7)

On July 5, 2016, Respondent filed Corrected Exceptions to the ALJ's Decision. (265-6) Respondent alleged that: (1) the ALJ erroneously determined that the union's ULP was timely, and (2) the ALJ erroneously determined that Respondent failed to rebut the presumption that Charging Party was the exclusive representative of Respondent's employees. (265-6) On November 29, 2016, after briefs were submitted, Petitioner issued its Decision and Order affirming the ALJ's

rulings, findings and conclusions and adopted, with slight modification, the ALJ's recommended Order. (281)

In its first footnote, Petitioner stated that by agreeing with the ALJ that the instant proceeding is not time-barred, it was relying upon established Board precedent holding that the 6-month limitations period prescribed by Sec. 10(b) of the Act begins to run only when a party has clear and unequivocal notice of a violation of the Act; actual or constructive notice will not be found where a party sends conflicting signals or otherwise engages in ambiguous conduct. (281) The Petitioner also found that prior to January 13, 2015, the Respondent did not manifest a clear and unequivocal repudiation of its overall bargaining obligation to begin the running of the 10(b) period. (281)

In its second footnote, Petitioner, incorrectly, asserted that there were no exceptions to the judge's grant of an affirmative bargaining order which is an "extraordinary remedy." (281) While Respondent did not file a specific exception to the remedy portion of the ALJ's decision, Respondent did file an exception to that portion of the ALJ's decision upon which the remedy of an affirmative bargaining order was based. (265) Specifically, Respondent took exception to the ALJ's erroneous determination that Respondent failed to rebut the presumption that Charging Party was the exclusive representative of Respondent's employees.

(265-6) Petitioner did not address in its November 29, 2016 Decision and Order the merits of Respondent's second exception. (281)

On February 1, 2017, Petitioner filed an Application for Enforcement of Order with this Court. On February 19, 2017, Respondent filed its answer. As a result, this Brief ensues.

VII. SUMMARY OF THE ARGUMENT

The Petitioner erroneously applied the incorrect legal standard and, as a result, failed to determine that the Charging Party's unfair labor practice charge was untimely filed since the claimed violation upon which it was based was inescapably grounded on events predating the six month limitations period. Also, the Petitioner erroneously applied the incorrect legal standard and, as a result, failed to find that the Respondent properly withdrew recognition of Charging Party on January 13, 2015 because Charging Party, at that time, no longer represented a majority of Respondent's employees in the claimed bargaining unit.

VIII. ARGUMENT

This Court should not enforce Petitioner's November 29, 2016 Decision and Order for two main reasons. First, Charging Party's unfair labor practice charge filed on January 15, 2015 is untimely because it is inescapably grounded on events predating the six months limitations period and is, therefore, time-barred. Second, Respondent properly withdrew recognition of Charging Party on January 13, 2015 because, at that date, Charging Party no longer represented a majority of Respondent's employees in the claimed unit.

A. Charging Party's Unfair Labor Practice Charge Filed on January 15, 2015 is Time Barred.

Charging Party's unfair labor practice charge filed on January 15, 2015 is untimely because it is inescapably grounded on events predating the six months limitations period. The Petitioner erroneously applied the incorrect legal standards to find that the unfair labor practice charge was timely filed. This Court reviews the NLRB's conclusions of law de novo. ***Pleasantview Nursing Home v. N.L.R.B., 351 F.3d 747 (2003).*** If the NLRB errs in determining the proper legal standard, this Court may refuse enforcement on the grounds that the order has no reasonable basis in fact. ***Id.*** Here, Petitioner did not follow the appropriate legal standards set forth by this Court to determine that the unfair labor practice was untimely under Section 10(b) of the NLRA.

Section 10(b) of the NLRA provides that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. 29 U.S.C.§160(b). In ***Local Lodge No. 1424 et al. v. N.L.R.B., 362 U.S. 411 (1960),*** the United States Supreme Court held that the unfair labor practice charge was barred by the six month limitations period of Section 10(b) because the violation upon which the charge was based was inescapably grounded on events predating the six months limitations period.

In ***Local Lodge No. 1424,*** the parties originally entered into a CBA with a recognition clause by which the union was recognized as the sole and exclusive bargaining agent for all of the employer's employees. When the CBA was executed the union did not represent a majority of the employees covered by the CBA's recognition clause. The Supreme Court noted that this was an unfair labor practice at the time the CBA was executed by the parties. More than six months after the CBA was originally executed, unfair labor practice charges were filed with the NLRB alleging the union's lack of majority status and the consequent illegality of the continued enforcement of the agreement.

The United States Supreme Court held that the unfair labor practices were time-barred because the entire foundation of the unfair labor practices charged was the union's time-barred lack of majority status when the original CBA was signed. The Court ruled that a violation which is inescapably grounded on events predating

the limitations period is directly at odds with the purposes of the section 10(b) limitations period. The Court noted that the unfair labor practices alleging the illegal enforcement of the CBA were manifestly not independent from the illegality of the CBA's execution. The Court stated "the circumstances which cause the agreement to be invalid existed only at the point in time in the past when the agreement was executed and are not thereafter repeated." (***Id., at 423***) Applying the United States Supreme Court's holding in ***Local Lodge No. 1424, supra.,*** to the instant case, this Court should reverse the Petitioner's November 29, 2016 Decision and Order and dismiss the unfair labor practice charge with prejudice because it did not apply the correct legal standard to find the charge time-barred.

Here, Respondent's claimed violation of the Act, i.e., its withdrawal of recognition of and refusal to bargain with Charging Party on January 13, 2015, is inescapably grounded on events that occurred more than six months before the unfair labor practice charge was filed on January 15, 2015. Specifically, Respondent's claimed illegal refusal of recognition and bargaining is based on the January, 2011, settlement agreement which was executed four (4) years earlier to address Respondent's previous alleged refusal to bargain. Respondent's alleged illegal refusal to bargain with and recognize Charging Party has continued unabated since January, 2011. Because of this, Respondent's alleged January 13, 2015 illegal conduct is inescapably grounded on events that occurred more than

four (4) years before the unfair labor practice charge was filed. Respondent's argument in this regard is supported by Arini's testimony and Petitioner's Complaint.

Arini believed that since the January 16, 2011 settlement agreement was entered, Respondent has not responded in good faith to the Charging Party's request to bargain. (89) Arini stated that this was one of the reasons he contacted Sobran in January, 2015. (98) Also, Arini contacted Sobran monthly from January, 2012, until January, 2015, without success, to request bargaining. (72-6) Yet Arini took no other steps during this time period to address this concern. (77-8) Thus, Arini's testimony makes it clear that Respondent's claimed illegal refusal to bargain with and recognize Charging Party on January 13, 2015 is inescapably grounded on events dating back more than four (4) years earlier when the January, 2011, settlement agreement was executed to redress Respondent's alleged previous and similar refusal to bargain.

Petitioner's Complaint against Respondent also confirms that the unfair labor practice charge of January 15, 2015 is untimely because it is "inescapably grounded" on the January, 2011, settlement agreement which was executed approximately four (4) years before. Petitioner's Complaint alleges that Charging Party has been the exclusive collective-bargaining representative since the January, 2011, recognition agreement was executed. (158) The Complaint further alleges

that since January 13, 2015, Respondent has failed to bargain collectively with Charging Party as the exclusive collective-bargaining representative of the claimed unit. (158) This latter allegation is thus inescapably grounded on the time-barred allegation related to the January, 2011, settlement agreement. The circumstance of Respondent's claimed refusal to bargain with and recognize Charging Party is based solely on the settlement agreement executed four (4) years earlier and, as a result, the unfair labor practice charge is time-barred pursuant to section 10(b).

B. Respondent Properly Withdrew Recognition of Charging Party Because it No Longer Had Majority Support.

Charging Party is not the exclusive representative of a majority of Respondent's employees in an appropriate bargaining unit for purposes of bargaining and it was, therefore, permissible for Respondent on January 13, 2015 to refuse it recognition. The Petitioner erroneously applied the incorrect legal standards to hold that Respondent had not presented sufficient evidence of Charging Party's lack of majority support. This Court reviews the Petitioner's conclusions of law de novo. ***Pleasantview Nursing Home, supr.*** This Court may refuse enforcement on the grounds that Petitioner's order has no reasonable basis in law. ***Id.*** Here, this Court should refuse to enforce Petitioner's order because Petitioner did not apply this Court's legal standards to determine that Respondent

properly withdrew recognition from Charging Party because it no longer enjoyed majority support.

It is settled law that once a successor employer forms a reasonable, good faith doubt as to the union's continuing majority status, it is no longer bound to continue recognition and bargaining. ***Landmark Intern. Trucks, Inc. v. N.L.R.B., 699 F.2d 815 (1983).*** Further, an employer may withdraw recognition after the first year of certification if it demonstrates by objective evidence that is clear, cogent and convincing either: (a) that the union no longer has a majority, or (b) that it has a bona fide belief that the union no longer has the support of a majority of the employees. ***Id.*** Once sufficient evidence has been presented to raise a reasonable doubt as to the continued majority status of a union the rebuttable presumption of majority status is overcome and the burden shifts to Petitioner to prove that on the crucial date, the union in fact represented a majority of the employees. ***Id.***

Here, Respondent has presented clear, cogent and convincing objective evidence that Charging Party no longer represented a majority of its employees in the claimed unit and that it had a bona fide belief that the Charging Party no longer had such support on January 13, 2015, the date Respondent withdrew recognition. Again, this proposition is established by Arini's testimony. Airini admitted that Charging Party has had no dues paying members working for Respondent since

June, 2014 when Mr. Buono retired. (81, 87) Arini stated that he learned this in October, 2014, when he was made aware at a trustees meeting that Respondent was requesting a refund of the insurance payments made on his behalf. (81) Arini testified: "well, that would have meant that he was the last dues-paying member at the Temple and that I was going to need to get another, or get the collective bargaining agreement signed, or get a collective bargaining agreement negotiated and signed." (81) This objective evidence of the Charging Party's lack of majority status is similar to the evidence of a substantial decline in dues checkoff which the Court in ***Landmark, supra.,*** found to be the most probative evidence of loss of union support. (***Id., at 820***) This clear, cogent and convincing objective evidence served as the basis of Sobran's good faith belief, when contacted by Arini on January 13, 2015, that Charging Party had no members working on site and that, as a result, he could withdraw recognition lawfully.

Respondent has presented other clear, cogent and convincing objective evidence that Charging Party no longer had majority support and that it had a bona fide belief that Charging Party no longer had such support as of January 13, 2015. Arini admitted that since December, 2010, he has not sent any written demand to bargain with Sobran. (87-8) Airini had no idea of how many of Respondent's employees could possibly be in Charging Party's claimed bargaining unit. (88) Arini was last on site prior to June, 2013. (92-3) Since then, Arini admitted that

he has no personal knowledge of Respondent's employees that might have fit within Charging Party's bargaining unit. (88)

All of the foregoing clear, cogent and convincing evidence establishes that Charging Party did not, in fact, enjoy majority status as of January 13, 2015 and/or that Sobran had a bona fide belief that Charging Party did not enjoy majority status as of January 13, 2015. Even assuming arguendo that Charging Party did not enjoy majority status as of January 13, 2015, Respondent's reasonable, good-faith doubt as to Charging Party's majority status is a complete defense to a refusal to bargain charge. (***See e.g., Dayton Motels, Inc., 474 F.2d 328; 331-2. (6th Cir. 1973)***)

IX. CONCLUSION

WHEREFORE, Respondent respectfully requests that this Court reverse the Petitioner, refuse to enforce Petitioner's November 29, 2016 Decision and Order, dismiss Charging Party's unfair labor practice charge with prejudice and grant any other relief deemed just and necessary.

Sincerely,

Date: May 1, 2016

By: */s/Eric I. Frankie*

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Respondent Masonic Temple Association of Detroit and 450 Temple, Inc., a single employer, certifies that pursuant to FRAP 32(g) the foregoing Brief complies with the type-volume limitation. I am relying on the word count of the Microsoft Word processing system used to prepare this Brief. Based on my word processing system, this Brief contains 4,376 words.

By: */s/Eric I. Frankie (P47232)*
Eric I. Frankie
Respondent's Attorney

CERTIFICATE OF SERVICE

I, Eric I. Frankie, certify that on May 1, 2017, a copy of Respondent Masonic Temple Association of Detroit and 450 Temple, Inc., a single employer's Brief in Opposition to Enforcement of Decision and Order of NLRB and this Certificate of Service were served on Petitioner's attorney, Linda Dreeben, by CM/ECF filing with this Court.

/s/Eric I. Frankie
Eric I. Frankie (P47232)